

1 *(Proceedings convened in open court at 4:08 p.m.)*

2 **COURTROOM DEPUTY:** *Dallas McIntosh vs. Wexford*
3 *Health Sources, et al., Case No. 17-103, is called for a*
4 *Pavey hearing.*

5 Will the parties please identify themselves for the
6 record.

7 **THE COURT:** Mr. McIntosh, can you see me? Can you
8 hear me?

9 **MR. McINTOSH:** Yes, sir, I can.

10 **THE COURT:** All right, very good. Who do we have
11 for Wexford Health Sources today?

12 **MR. SHARP:** Rodney Sharp and Kevin Peek on behalf
13 of Wexford Health Sources and Barbara Rodriguez, Your Honor.

14 **THE COURT:** All right, very good. Mr. Sharp, do we
15 have -- oh, okay. You're over there.

16 We've got Mr. Huber here for Defendant Nancy Keen,
17 correct?

18 **MR. HUBER:** Yes, Your Honor.

19 **THE COURT:** We'll do this seated. We'll do it
20 sitting down today.

21 For the record, today is August 15th. It's about
22 4:12 by the courtroom clock. For the record, we previously
23 started this hearing, I believe it was on July 16th. Is
24 that the date? But, anyway, we previously started this
25 hearing, Mr. McIntosh, and I don't know about on your end

1 but on my end the screen just went brown, went black, and we
2 lost you. I'm told that it was because of a power -- they
3 didn't call it a black-out, they called it a brown-out, so
4 we lost you when we had started that hearing July 16th.

5 **COURTROOM DEPUTY:** Seventeenth.

6 **THE COURT:** All right, July 17th. And what had
7 happened -- and I believe where we were -- when we had that
8 hearing I had gone through the facts of your case and I went
9 through them in great detail, and we were just about to get
10 to what I needed to hear in order to make a ruling on the
11 motions that are in front of me. And the motion that's in
12 front of me, of course, is a motion, what we commonly call a
13 Pavey motion where defendants allege that you didn't exhaust
14 your remedies at the jail before you filed suit.

15 So that's where we were last time. I'm not going
16 to go back through all of those facts again. There was a
17 court reporter, and if need be, we can get a transcript of
18 that hearing. The Court is aware of the facts. The facts
19 were taken down by the court reporter, and if we ever need
20 to, we can get a transcript of that hearing from July the
21 17th.

22 And I think what had happened -- Mr. Sharp, I
23 believe that you were up, and I was just getting ready to go
24 into -- it's your motion, so I had some questions for you,
25 and I want to resume from that spot.

1 Why don't we do this. Why don't we just swing the
2 camera over to you, and he can hear me and he can see you as
3 we go through this.

4 Now, the first thing I want to talk about -- hold
5 on a second. I need to ask my clerk something.

6 *(Off the record discussion between the Court and law*
7 *clerk)*

8 **THE COURT:** All right. The facts of this case, of
9 course, implicate actions that happened at the St. Clair
10 County Jail. So I want to go through something, and --
11 Mr. Sharp, and then you tell me if I've got it right.

12 So what's at issue here is the grievance procedure
13 at the jail, correct?

14 **MR. SHARP:** Correct.

15 **THE COURT:** Okay. Pull the mic, for the plaintiff,
16 over.

17 **MR. SHARP:** Correct.

18 **THE COURT:** All right. Let me tell you what I
19 understand the grievance procedure at St. Clair County Jail
20 to be. All right. This is fairly new, I'll say, because at
21 one time, recalling Sheriff Justus came and told me the
22 grievance procedure was, if they had a problem, tell him.
23 So there is a procedure in place now at the county jail.

24 All right. And this is the procedure that I'm told
25 is in place, and you tell me if this is the procedure that

1 was in place when Mr. McIntosh was there. This procedure
2 was called a detainee rules and regulations, and it was set
3 forth in a manual that set forth the grievance procedure,
4 and that grievance procedure was that an inmate had to
5 submit what's called a captain's request, okay? And the
6 captain's request is a written document that is submitted to
7 the shift supervisor who, in turn, gives the request to the
8 captain.

9 Okay? So far, so good? Anything you disagree with
10 there?

11 **MR. SHARP:** No, Your Honor.

12 **THE COURT:** Okay. It appears to me, from what I
13 can tell, that if anything happens with the captain's
14 request, then the manual requires an inmate to submit a
15 formal grievance, again to the shift supervisor, within
16 writing within 24 hours after he learned of the
17 circumstances or conditions which prompted the grievance.

18 So far, so good?

19 **MR. SHARP:** That is correct.

20 **THE COURT:** Okay, all right. The shift supervisor
21 passes the grievance on to the immediate supervisor, and
22 what I can't tell is if this immediate supervisor is the
23 immediate supervisor of the shift supervisor or the
24 immediate supervisor of the person that the grievance is
25 regarding. I need a little help with that, who the

1 immediate supervisor is. And the supervisor has three days
2 to file a response, which the detainee can then appeal to
3 the assistant jail superintendent, who -- and, again, I'm
4 going in another case that I had here, that that assistant
5 jail superintendent was also the captain who got the
6 original captain's request, so -- and then on to the jail
7 superintendent who issues the final decision.

8 Am I right about the procedure?

9 **MR. SHARP:** I believe you are. That's three days,
10 not including weekends and holidays, Your Honor.

11 **THE COURT:** Okay. All right. So what we have here
12 and what I think is at issue is -- on Mr. McIntosh's part
13 is, was that procedure available to him? That's what he's
14 alleging. What he's alleging is that he was informed by
15 Sergeant Strubberg -- he told Sergeant Strubberg he wanted
16 to file a grievance, correct, Mr. McIntosh?

17 **MR. McINTOSH:** That is correct, Your Honor.

18 **THE COURT:** All right. And he complained in his
19 complaint -- it's a verified complaint -- that Strubberg
20 informed him that he was under criminal investigation
21 concerning the pills that were discovered in his property
22 and that he would have to complete the investigation before
23 he could file a grievance.

24 He filed his complaint with a copy of the sheriff's
25 department incident report that corroborates the jail was

1 investigating the possibility of criminal charges. So there
2 was an investigation. He submitted the report. So that's
3 what -- that's where I am. If -- he was told even though
4 the process was in place, his position is, he was told he
5 couldn't start the process until the criminal charges --
6 'til an investigation regarding the criminal charges was
7 complete.

8 **MR. SHARP:** That's --

9 **THE COURT:** I'm asking. I mean that's what he's --
10 that's his position, correct?

11 **MR. SHARP:** That's not quite how I understand his
12 position, Your Honor.

13 **THE COURT:** You tell me how you understand his
14 position. He's here and he can clear it up.

15 **MR. SHARP:** Attached to Mr. McIntosh's response
16 were two documents, Exhibit A and an Exhibit B. My
17 understanding is, Exhibit A is a captain's complaint form
18 that he, that Mr. McIntosh claims to have submitted on
19 August 4th, 2013, the day that he was moved from max, from
20 the infirmary to max, after the discovery of contraband in
21 his bunk in the infirmary.

22 Exhibit B is the complaint form that he completed
23 on August 5, 2013, the following day. And so he started the
24 process, and his claim is that it was after that point in
25 time when Sergeant Strubberg handed these back to him a few

1 days later and told him that he does not need to do anything
2 further, that he's claiming that Sergeant Strubberg told him
3 that he didn't have to do anything.

4 **THE COURT:** Well, I'm a little -- okay. Let's
5 figure that out.

6 Now, Mr. McIntosh -- okay.

7 **MR. McINTOSH:** Yes, Your Honor.

8 **THE COURT:** Is Mr. -- Mr. Sharp is correct when he
9 tells me you started the process on August 4th and 5th,
10 correct?

11 **MR. McINTOSH:** Yes, sir.

12 **THE COURT:** Okay. Now, at some point
13 Sergeant Strubberg gave you these documents back, is that
14 what you're telling me?

15 **MR. McINTOSH:** Yes, sir, he gave them to me. On or
16 about August 6th, I was called to the chapel. When I got
17 there I asked them about my grievances -- my chaplain's
18 request. I'm sorry. I often use the terms interchangeably.
19 I asked him about my captain's request. He told me that he
20 was in receipt of them, that he wanted to speak with me
21 about other matters first. That was when he tried to
22 interview me on tape about the possible criminal charges.
23 He read me my *Miranda* rights so I exercised them. As we
24 were ending the interview he began to speak to me saying we
25 were off the record, and in a conversation that then

1 happened was when he told me that -- all right. When I
2 first submitted the first captain's request on August 4th, I
3 submitted it to officer named C/O Dante Beattie. He was of
4 the same work shift that discovered the pills. And upon
5 submitting that to him, because I already had that in my
6 possession --

7 **THE COURT:** Slow down. You're going too fast.
8 You're killing the court reporter. You're going too fast.
9 Slow down.

10 **MR. McINTOSH:** I'm sorry.

11 All right. When I first submitted my first
12 captain's request on August the 4th, I submitted it to the
13 C/O named Dante Beattie. He was of the same work shift that
14 had discovered the pills earlier that morning. When I
15 submitted it to him, I asked him for a formal detainee
16 grievance form and I also asked him for a sick call slip.
17 It was at that point that he informed me that he could not
18 give me a detainee grievance form because, as you say,
19 Your Honor, something must be done about the captain's
20 request first before I could receive a detainee grievance
21 form.

22 **THE COURT:** Okay. But at some point -- hold on.
23 At some point you filled out the captain's request, then you
24 filled out a complaint form, right?

25 **MR. McINTOSH:** I filled out a captain's request on

1 August 4th.

2 **THE COURT:** Right.

3 **MR. McINTOSH:** And I filled out another captain's
4 request on August 5th. I never got a response to those.

5 **THE COURT:** All right. Hold on. I just need the
6 information I need, okay?

7 **MR. McINTOSH:** Okay.

8 **THE COURT:** So you filled out two; one on
9 August 4th, one on August 5th?

10 **MR. McINTOSH:** Yes, sir.

11 **THE COURT:** You talked to Sergeant Strubberg. Am I
12 saying it right, "Strewberg", "Strubberg"?

13 **MR. McINTOSH:** It's "Strewberg," yes, sir.

14 **THE COURT:** "Strewberg," okay. And he tried to
15 interview you, you exercised your rights, and then we were
16 at the end of the interview he wanted to talk to you off the
17 record, and he told you what?

18 **MR. McINTOSH:** He told me that the first step
19 that -- because I was under criminal investigation, the
20 first step in grievance process would be for the
21 investigation to be completed before I would receive an
22 answer to my captain's request and then be allowed to retain
23 a detainee grievance form.

24 **THE COURT:** Okay. Stop, stop. Time out. I just
25 want to make sure. I just need to know what I need to know,

1 okay?

2 **MR. McINTOSH:** Yes, sir.

3 **THE COURT:** So what you told me was, you talked to
4 Strubberg, he told you that you couldn't get -- you couldn't
5 go any further in the process until the criminal
6 investigation was complete, correct?

7 **MR. McINTOSH:** That is correct, Your Honor.

8 **THE COURT:** All right. Okay. All right. When
9 was -- and this is for you, Mr. Sharp, or Mr. McIntosh.
10 When was the investigation completed?

11 **MR. SHARP:** Well --

12 **MR. McINTOSH:** It was never completed.

13 **THE COURT:** All right. Hold on. I got that. Your
14 position is it was never completed. What's the defendants'
15 position? Was it ever completed?

16 **MR. SHARP:** The source of the contraband was
17 identified about 14 months after it was discovered in
18 Mr. McIntosh's bunk.

19 **THE COURT:** So would it -- is it fair to say that
20 that investigation was over for 14 months, is that right?

21 **MR. SHARP:** That's exactly right, Your Honor.

22 **THE COURT:** Okay. All right. Now, when did -- and
23 I'm just asking. I just need these facts. I'm going to
24 hear your argument. I'm not precluding any argument from
25 you or anything that you want to tell me. I just want to

1 make sure I understand what Mr. McIntosh's position is.

2 Okay. So the 14 months, the criminal investigation
3 was open. When was Mr. McIntosh transferred from the jail
4 to IDOC?

5 **MR. SHARP:** I don't know the answer to that,
6 Your Honor, off the top of my head.

7 **THE COURT:** You can help me with that, Mr. Huber?

8 **MR. HUBER:** January 30th, 2015.

9 **THE COURT:** January 30th of what year?

10 **MR. HUBER:** 2015.

11 **THE COURT:** 2015. So when he was transferred, you
12 said January the --

13 **MR. HUBER:** Thirtieth.

14 **THE COURT:** Thirtieth, okay. So when he was
15 transferred, the criminal investigation was still open,
16 correct? Didn't this happen in '14?

17 **MR. SHARP:** It happened in --

18 **MR. HUBER:** '13.

19 **MR. SHARP:** -- '13.

20 **THE COURT:** '13, okay. Well, let's see. Okay. So
21 August of '13. So 14 months would have been around October
22 of '14.

23 So, now, Mr. McIntosh, were you ever notified that
24 the criminal investigation was over?

25 **MR. McINTOSH:** Absolutely not, sir. And the thing

1 is that the defendants here are making an assumption that
2 the investigation was over. Strubberg never said that. In
3 fact, I --

4 **THE COURT:** Time out. Just listen to me. Just
5 answer my questions. You're telling me more information
6 than I need, okay?

7 Were you ever informed -- is the simple question --
8 were you ever informed that the criminal investigation was
9 over?

10 **MR. McINTOSH:** No, sir.

11 **THE COURT:** By anybody at the jail before you
12 were --

13 **MR. McINTOSH:** No, sir, absolutely not.

14 **THE COURT:** Okay. That's my question. Okay.
15 Now -- all right.

16 Now, Mr. Sharp, how do you respond to his position
17 that -- and the legal theory that he's asserting is that the
18 grievance process was not available to him because he was
19 told he couldn't go further in it until the criminal
20 investigation was over. What he's told me is, to this day
21 he didn't know that the criminal investigation was ever
22 over.

23 **MR. SHARP:** Sergeant Strubberg will testify
24 otherwise, Your Honor.

25 **THE COURT:** Well, hold on. Talk into the mic. I

1 want to hear. Tell me what -- is Sergeant Strubberg here?

2 **MR. SHARP:** He is here.

3 **THE COURT:** Okay. Tell had me a proffer of
4 Sergeant Strubberg's testimony.

5 **MR. SHARP:** Sergeant Strubberg will testify that he
6 never told Mr. McIntosh not to file a grievance, not to file
7 a captain's request, or anything along those lines.

8 More importantly, Judge, what I'd like for you to
9 consider is that Exhibits A and B are the complaints that
10 Mr. McIntosh claims to have filed on October 4th and 5th.

11 **THE COURT:** August.

12 **MR. SHARP:** Excuse me. Thank you. August 4th and
13 5th of 2013. Sergeant Strubberg will tell you that they
14 conducted an extensive investigation to find out how it was
15 that Mr. McIntosh received both prescription and
16 nonprescription medications, lighters, rolling papers, and
17 cigarettes, and that it took them 14 months to identify the
18 source of that contraband as being somebody within the
19 healthcare unit. And he will tell you that if he had
20 Exhibits A or B at any point in time, which clearly identify
21 the source of the contraband as a nurse, it wouldn't have
22 taken them 14 months to conduct their investigation.

23 **THE COURT:** So hold on. I want to -- hold on. I'm
24 just -- you're telling me more than I want to know, too, so
25 listen. So are you -- is it your position then that these

1 documents, A and B, were not filed at the jail?

2 **MR. SHARP:** Absolutely.

3 **THE COURT:** So they were not filed at the jail?

4 **MR. SHARP:** That is correct.

5 **THE COURT:** Okay. All right.

6 **MR. SHARP:** It's our -- there's no indication on
7 either of the documents, like with other grievances, that
8 they were reviewed by anybody or received by anybody at the
9 jail, and --

10 **THE COURT:** Well, his testimony is Strubberg gave
11 them back to him.

12 **MR. SHARP:** So that means Sergeant Strubberg had
13 them in his possession at some point in time.

14 **THE COURT:** Correct.

15 **MR. SHARP:** Sergeant Strubberg will tell you he
16 would have read them, and if he read them that said that
17 they --

18 **THE COURT:** You're telling me more. You're telling
19 me Strubberg says he never saw them, period?

20 **MR. SHARP:** Correct.

21 **THE COURT:** Okay. That's what I want to know. All
22 right. Also, I want to know, will Sergeant -- is it
23 Sergeant Strubberg?

24 **MR. SHARP:** Yes.

25 **THE COURT:** Will Sergeant Strubberg testify that he

1 did not have an off-the-record conversation with
2 Mr. McIntosh?

3 **MR. SHARP:** I don't know the answer to that. I
4 think he'll testify that the conversation with Mr. McIntosh
5 is different than how Mr. McIntosh just relayed it.
6 Mr. McIntosh would not give him any information at that
7 point in time, and he never got to the point of Mirandizing
8 him.

9 **THE COURT:** Come on up, Sergeant Strubberg. Come
10 on up. This is how we're going to do this, Mr. McIntosh.
11 Raise your right hand.

12 **STEVE STRUBBERG, DEFENDANT'S WITNESS, SWORN**

13 **DIRECT EXAMINATION**

14 **QUESTIONS BY THE COURT:**

15 **THE COURT:** Very good. I'm going to -- I've sworn
16 Sergeant Strubberg in. I'm going ask him some questions.
17 If you have questions for him, you can ask me. If they're
18 relevant, I'll ask him. Okay? But if you listen, I may ask
19 the questions that you would have asked.

20 Q. (The Court) All right. Very good. You heard my
21 question. You heard Mr. McIntosh testify. He also testified
22 that you brought him in to interview him about the appeals, is
23 that correct?

24 A. That is correct.

25 Q. Okay. He also testified that you read him his *Miranda*

1 rights, is that correct?

2 A. I don't recall if we made it to *Miranda*. I do recall
3 he --

4 Q. Pull the microphone up. I don't know if he can hear
5 you.

6 A. Your Honor, I don't recall if we made it to *Miranda*.
7 I do remember --

8 **THE COURT:** Can you hear him, Mr. McIntosh?

9 **MR. McINTOSH:** Yes, Your Honor.

10 **THE COURT:** All right. Very good. Go ahead.

11 **THE WITNESS:** I don't recall if we made it to
12 *Miranda*. I do recall him telling me he did not want to
13 discuss the incident with me.

14 Q. (The Court) Okay. Now, you also heard him tell me that
15 you -- at the end of the conversation, after he invoked his
16 rights, you asked to have a conversation with him off the
17 record. Did you ask to have a conversation with him off the
18 record?

19 A. No, Your Honor, I did not.

20 **THE COURT:** Okay. Is there anything else you want
21 me to ask Sergeant Strubberg, Mr. McIntosh?

22 **MR. McINTOSH:** Yes, sir. Several things. First,
23 it is true that I was under criminal investigation, correct?

24 **THE COURT:** Hold on. Hold on. Tell me what the
25 question is. I'll ask the question. And I think that

1 that -- but, anyway, he can answer it. But I mean he said
2 he brought you in to ask you about that.

3 Q. (The Court) It's true he was under criminal
4 investigation?

5 A. I wouldn't categorize Mr. McIntosh as being under
6 criminal investigation. We were investigating the source of
7 the contraband. It was clearly in his possession.

8 Q. Okay. So, but it was illegal contraband, correct?

9 A. Correct.

10 Q. And it could possibly have been a criminal offense,
11 correct?

12 A. It could have been, yes.

13 **THE COURT:** Okay. So what they're saying,
14 Mr. McIntosh, is that evidently they had not determined at
15 that point if you were under criminal investigation, but you
16 could have been.

17 All right. What's your other question?

18 **MR. McINTOSH:** Let me rephrase it then. The report
19 that was issued about the discovery of appeals, it did say
20 at the bottom of the report that all of the evidence had
21 been forwarded for criminal investigation, is that correct?

22 **THE COURT:** Wait. What report are we talking
23 about? Give me a date on the report.

24 **MR. McINTOSH:** That was the jail incident report,
25 Your Honor, that was attached to my verified complaint.

1 **THE COURT:** Okay. Give me a date on it. I don't
2 have all those documents -- well, I do have a lot of
3 documents but I don't want to search through. Just tell me
4 the date.

5 **MR. McINTOSH:** Sorry.

6 **THE COURT:** That's all right. I guess I'll search,
7 too. We'll all search for the date, the jail incident
8 report.

9 **MR. McINTOSH:** The date of the report,
10 Your Honor -- there's two dates on here. It says -- it's --
11 I'm going to tell you what document number it is because I
12 filed it. It's Document No. -- oh, boy. It's page ID
13 No. 25. It says it was submitted on the 4th of August 2013,
14 but there's a date at the top, too, that says October the
15 20th, 2014.

16 **THE COURT:** Yeah, but that's -- the date that it
17 was signed was August the what?

18 **LAW CLERK:** I think it's Document 1, Exhibit 1.

19 **MR. McINTOSH:** It was never signed. It's a typed
20 report. It doesn't have a signature.

21 **THE COURT:** Okay. So, typed report. Do I have it?

22 **LAW CLERK:** I don't think you do, but it's right
23 here. (Showing document to the Court).

24 **THE COURT:** Okay. This is Jail Incident Narrative
25 on Sunday, August the 4th. Okay. The report was forwarded

1 to investigations for possible criminal charges. The
2 officer -- "This officer requests a privilege review hearing
3 for Detainee McIntosh -- detainee rules and regulations."

4 Okay. It says it was referred. I don't think
5 that's anything different, Mr. McIntosh. It said it was
6 referred for possible criminal charges. It doesn't say as
7 to who. And the testimony -- here you go -- of
8 Sergeant Strubberg is that they were looking for the source
9 of the drugs. So it does say, "referred for possible
10 criminal investigation," but it doesn't say as to who.

11 So what else do you want to ask this witness?

12 **MR. McINTOSH:** All right. The defendant's lawyer,
13 you know, they just said that had he had the reports from me
14 that -- and they would have known it was a nurse, that the
15 investigation would have instantly been over because they
16 would have discovered the source of the contraband.
17 However, this report, the same one that --

18 **THE COURT:** Hold on. Tell me what your question
19 is.

20 **MR. McINTOSH:** My question --

21 **THE COURT:** Go ahead.

22 **MR. McINTOSH:** My question is: Did he know that
23 those pills that they had discovered came from the nurse's
24 formulary, from Wexford's formulary inside of the nurse's
25 office?

1 **THE COURT:** Okay. Very good.

2 Did you know -- he wants to know if you knew that
3 the source of the pills were the nurses at the jail?

4 **THE WITNESS:** I recall taking the pills to the
5 nurse's office. They used a encyclopedia of sorts to
6 look -- some of them were damaged and discolored. I
7 remember us working our best to figure out what each of them
8 were. I don't recall specifically if any of them were not
9 in the formulary.

10 **THE COURT:** Okay. So the answer is -- I don't
11 understand. He wants to know if you knew that those were --
12 those pills came from the nurse's formulary?

13 **THE WITNESS:** No.

14 **THE COURT:** Okay. The answer's no.

15 **MR. McINTOSH:** Okay. Had he ever seen his jail
16 incident report, the same one we just reviewed? Had he ever
17 read it before?

18 **THE COURT:** Read it when? Give me a time. You got
19 to put a time on it. You mean as we sit here today?

20 **MR. McINTOSH:** No, no. Had he read it at the time
21 that he had interviewed me?

22 **THE COURT:** Were you aware of this incident report
23 at the time you interviewed him?

24 **THE WITNESS:** I read that report when I returned to
25 work the Monday after the incident, yes.

1 **THE COURT:** So, no. Yes or no, before you
2 interviewed him?

3 **THE WITNESS:** Yes.

4 **THE COURT:** Yes, he was aware of it.

5 **MR. McINTOSH:** Okay. Your Honor, I just want to
6 note for the record that in this report --

7 **THE COURT:** I've got the report. Don't -- we're
8 not to that right now. These are questions for
9 Sergeant Strubberg. We'll do the noting later. Any other
10 questions for Sergeant Strubberg?

11 **MR. McINTOSH:** Yes, sir. In that report, did it
12 say --

13 **THE COURT:** No, no, no. Listen, time out. We're
14 not going through -- if you have a question -- the report
15 says what it says. I can read the report. If you have a
16 question for Sergeant Strubberg, it's not -- I don't want
17 him to read the report. Okay. Go ahead.

18 **MR. McINTOSH:** Did Nurse Rodriguez identify that
19 several of those pills had come from the jail's formulary?

20 **THE COURT:** Did Rodriguez tell you or -- and if the
21 report says that, the report says it, but do you recall
22 Rodriguez telling you that several of those pills came from
23 the formulary?

24 **THE WITNESS:** I don't recall speaking with
25 Nurse Rodriguez, no.

1 **THE COURT:** Okay. He doesn't recall speaking with
2 Rodriguez. If the report says something different,
3 Mr. McIntosh -- the report says what it says. He doesn't
4 recall speaking with Rodriguez.

5 **MR. McINTOSH:** I mean, Your Honor, I just don't
6 know what to ask because I'm just getting a blanket denial.
7 I don't know how to cross-examine just a blanket *I don't*
8 *remember this*. I mean --

9 **THE COURT:** I understand, it's difficult.

10 **MR. McINTOSH:** I can't defeat that.

11 **THE COURT:** Hold on. It's very difficult, all
12 right? And you're stuck with the answers that witnesses
13 give you. That's -- lawyers are stuck with the answers
14 witnesses give. That's the way it works.

15 I will hear what you want to tell me in a second,
16 but I just want to know, before I release Strubberg, is
17 there anything else you want to ask him? I'll hear your
18 argument in a minute.

19 **MR. McINTOSH:** Did you ever try to prevail upon a
20 legal representative who had come to visit me at the
21 St. Clair County jail to pump me, to ask me questions
22 pertaining to your investigation, to solicit information
23 from me to give to you and to Captain Trice [phonetic]?

24 **THE COURT:** Wait a minute. I don't understand your
25 question.

1 **MR. McINTOSH:** My question --

2 **THE COURT:** Hold on, hold on. Did he ever -- what
3 legal representative? I'm not understanding what you mean
4 by "legal representative". Are you saying that he sent a
5 lawyer? You want me to ask him if he sent a lawyer to ask
6 you questions about the investigation?

7 **MR. McINTOSH:** Well, Your Honor, my lawyer had a
8 alternative sentencing mitigation specialist come visit me
9 at the jail. And my question to him is did he and
10 Captain Trice inform her that I was the subject of a
11 criminal investigation and then try to ask her to ask me
12 questions about the pills that they wanted to know? Did
13 they try to get her to solicit information from me to give
14 to them for their investigation?

15 **THE COURT:** All right. Did you ask anybody, legal
16 representative, mitigation specialist, lawyer, did you ask
17 anybody to question him about this investigation?

18 **THE WITNESS:** Absolutely not, Your Honor.

19 **THE COURT:** Do you know if Captain Trice asked
20 anybody? If you know. I'm just --

21 **THE WITNESS:** Not that I'm aware of, no.

22 **THE COURT:** Okay. All right.

23 **MR. McINTOSH:** After such an interview with her,
24 did you ever try to have one of your officers detain me in a
25 visiting room until you could come get me, and you and Trice

1 re-interviewed me in another office?

2 **THE COURT:** He said -- okay. After he --

3 **MR. McINTOSH:** This is the second interview,
4 Your Honor. This is not the first one referred to.

5 **THE COURT:** I got you. Did you attempt to
6 interview him again, do you recall?

7 **THE WITNESS:** I recall some 14 months later, when I
8 discovered who was guilty of giving him the contraband, I
9 asked him at that time again if he would like to speak to me
10 on camera.

11 **THE COURT:** And he said?

12 **THE WITNESS:** He refused to speak with me.

13 **THE COURT:** He said he asked you again after they
14 completed the investigation if you'd speak to him and you
15 declined.

16 **MR. McINTOSH:** How did you make contact with me to
17 try to --

18 **THE COURT:** How's that relevant? Tell me the
19 relevance of that. That doesn't have anything to do -- no,
20 no, no. Stop, stop. We're only today talking about whether
21 you exhausted your administrative remedies. We're not into
22 the merits of your case, okay? So that's -- I'm trying to
23 figure out how that's relevant to whether you exhausted your
24 remedies.

25 **MR. McINTOSH:** It goes to his credibility,

1 Your Honor, because -- I don't know how to do this.

2 **THE COURT:** I understand. I'm not going any
3 further. That's not relevant to this.

4 **MR. McINTOSH:** Can I ask him if he recorded the
5 first interview with me?

6 **THE COURT:** I sure will. Did you record the
7 interview?

8 **THE WITNESS:** I don't recall any recording on the
9 first interview. I just recall him refusing to speak with
10 me.

11 **THE COURT:** Okay. He doesn't recall. If that
12 interview is recorded, you have to produce that, so -- but
13 he doesn't recall it being recorded, but if it was, I'm
14 going to order him to produce that. Okay.

15 **MR. McINTOSH:** Do they have that same computer
16 system that existed in his -- because this is what they
17 recorded me on.

18 **THE COURT:** Look, look, look. This is not relevant
19 to exhaustion, all right? I'm giving you leeway.

20 **MR. McINTOSH:** -- show what he told me. It's going
21 to show what he told me.

22 **THE COURT:** All right. If -- Mr. McIntosh, if
23 there is a recording, there is a duty to produce it. And
24 I'm -- and Mr. Sharp is the lawyer, he recognizes the duty.
25 If there's a recording, I want it.

1 **MR. SHARP:** I would not have possession of that,
2 Your Honor, because -- I can certainly inquire from the
3 county whether or not they have it and let the Court know
4 what I learn.

5 **THE COURT:** Time out. We've got all the parties
6 here. I want to know in five days if there's a recording,
7 period. All right. If there's a recording, there's a
8 recording, the Court will get it.

9 **MR. McINTOSH:** Yes, sir.

10 **THE COURT:** All right. Thanks, Sergeant.

11 **THE WITNESS:** Thank you, Your Honor.

12 **THE COURT:** All right. Now, Mr. McIntosh, I do
13 realize that you have given me some affidavits of folks who
14 support your position, and the Court has those.

15 **MR. McINTOSH:** Yes, sir.

16 **THE COURT:** Okay.

17 **MR. SHARP:** Your Honor, may I -- before
18 Sergeant Strubberg leaves, can I make certain that the
19 proffer that I offered earlier will be considered by the
20 Court of what his testimony would be?

21 **THE COURT:** Yeah. He didn't --

22 **MR. SHARP:** I didn't get a chance to ask him any
23 questions.

24 **THE COURT:** You're right. Sergeant Strubberg is
25 still in the court. Sergeant Strubberg, consider yourself

1 still under oath. You adopt the proffer that Mr. Sharp
2 presented to the Court?

3 **THE WITNESS:** I do.

4 **MR. SHARP:** Can I briefly examine him on two
5 questions, Your Honor?

6 **THE COURT:** What questions? What else we need to
7 know?

8 **MR. SHARP:** One is -- what the Court hasn't been
9 told in evidence is what the contraband consisted of.

10 **THE COURT:** Not necessary. That's irrelevant.

11 **MR. SHARP:** Okay. And then two is -- well, I'll
12 explain later why it is, but two is, what the investigation
13 did.

14 **THE COURT:** Explain to me now why what he had is
15 relevant when the issue is, did he exhaust his remedies?

16 **MR. SHARP:** Because, Your Honor, this is going to
17 come down to an issue of credibility between Mr. McIntosh
18 and Sergeant Strubberg, and it's not just a matter of
19 credibility but it's also what reasonable inferences can be
20 drawn from the evidence. Sergeant Strubberg would tell the
21 Court that an extensive investigation was done that led them
22 to other people away from the infirmary, and that if the
23 sergeant had had these documents identifying the nurse, it
24 would have been a different result.

25 **THE COURT:** You told me that 20 minutes ago. I'm

1 trying not to be impatient, but, man, you told me that. And
2 I'm trying to get to the point of what I need to hear, and
3 you and Mr. McIntosh are telling me stuff I don't need to
4 hear. Okay. All right. Here we go. I'm trying not to be
5 impatient but it's very difficult.

6 Okay. What Mr. McIntosh tells me in his verified
7 complaint is that he had taken 10 to 15 pills at the time he
8 was suicidal. He had suffered a head injury and was
9 unconscious during the 24 hours that you guys say he should
10 have filed a grievance.

11 Okay. Is there any -- do you have any evidence to
12 the contrary that goes to his state of being?

13 **MR. SHARP:** Yes. That's inconsistent with the
14 position he's taken when he claims that he completed a
15 5-page exhibit on the evening of August 4th, or 8-page
16 exhibit on the evening of August 4th, as well as an exhibit
17 the following day.

18 And, Your Honor, to add to our argument, it's not
19 just -- the fact of the matter is, the first grievance that
20 Mr. McIntosh claims to have filed, whether it's a grievance
21 or a captain's complaint, was on August 4th after he was
22 caught with the contraband. He says that he'd been given
23 these materials for months. No grievances were submitted by
24 him during any of that period.

25 **THE COURT:** I got you. The answer to my question

1 is you pointed me to the exhibits that he filed.

2 **MR. SHARP:** Thank you.

3 **THE COURT:** All right. So we've heard from
4 Sergeant Strubberg.

5 And come back, Sergeant Strubberg. I'm sorry.
6 This is my fault. I should have looked at my questions
7 before I let you go, and I apologize.

8 **(Witness re-takes the stand)**

9 **THE COURT:** I'm just trying to get the timeline
10 down. You recall you're still under oath?

11 **THE WITNESS:** Yes, Your Honor.

12 **THE COURT:** Okay. When you first talked to
13 Mr. McIntosh, when you first talked to him, had the suicide
14 attempt happened at that point or was it after that?

15 **THE WITNESS:** Your Honor, I'm not familiar with
16 when the suicide attempt occurred. I can tell you I spoke
17 with him Monday or Tuesday when I came in after -- the
18 incident occurred on the weekend.

19 **THE COURT:** Okay. Mr. McIntosh, was -- and you can
20 tell me, was this suicide attempt before or after you talked
21 to Sergeant Strubberg?

22 **MR. McINTOSH:** It was before, Your Honor.

23 **THE COURT:** Before, okay. All right. Okay. And
24 just tell me -- I do need to know a little bit about that.
25 I mean I've got it in there but I want to hear it from you.

1 What happened after the suicide attempt? Were you
2 treated medically?

3 **MR. McINTOSH:** No, Your Honor. I remained
4 unconscious until about, I want to say about perhaps
5 11:30 or so the next day.

6 **THE COURT:** 1130 a.m. or p.m.? Morning or --

7 **MR. McINTOSH:** A.m., Your Honor.

8 **THE COURT:** A.m. So -- okay. 11:30 a.m. the next
9 day. Okay. Now, how long after that -- I'm just trying to
10 get a timeline down. How long after that -- was it the next
11 day you talked to Sergeant Strubberg?

12 **MR. McINTOSH:** Yes, Your Honor. I believe it was,
13 yes, sir.

14 **THE COURT:** Okay. All right. That's what I'm
15 trying to find out.

16 Okay. I have the affidavits from your witnesses,
17 Mr. McIntosh, and they're affidavits, they're taken under
18 oath, so they are evidence, where they say that they heard
19 Sergeant Strubberg tell you that you had to wait until the
20 investigation was complete to file a grievance. Okay. You
21 filed another affidavit, I don't think that one was
22 relevant, but the two are relevant, and the Court will
23 consider them as evidence.

24 I'm sorry, Sergeant. That's all I needed. Okay.
25 You're excused again.

1 All right. Now, it's your motion, Mr. Sharp. Tell
2 me what else I need to know.

3 **MR. SHARP:** There was no witness to the alleged
4 suicide attempt. And, again, Mr. McIntosh's testimony is
5 inconsistent with the notion that he filed these two
6 captain's complaints. I hope that the Court certainly isn't
7 going to reward him for filing these documents which he
8 claims were handed to him by Sergeant Strubberg because,
9 Your Honor, that's what it boils down to: Who do you
10 believe?

11 **THE COURT:** Well --

12 **MR. SHARP:** Mr. McIntosh or Sergeant Strubberg?
13 And if you look at these exhibits, Your Honor, you'll see
14 that in the first one Mr. McIntosh says, "I sent in a
15 captain's request complaint about the shakedown that caused
16 me to be sent to segregation and put on administrative
17 lockdown because some pills were found in the infirmary
18 which had been given to me by one of the nurses for months
19 now." And then the second one has even more allegations
20 regarding the nurse. It says, "The nurse was giving me the
21 pills while she was working in front of others." And the
22 simple fact of the matter is it's not --

23 **THE COURT:** Listen, I understand your argument.

24 **MR. SHARP:** It's not simply a matter of
25 credibility, but a reasonable inference from the evidence.

1 The documentary evidence is that these were never submitted
2 because it wouldn't have taken St. Clair County 14 months.

3 **THE COURT:** There's no jury here. There's no jury
4 here. I got your argument on that, and if you tell me five
5 times, it doesn't change. I heard it the first four. I got
6 your argument.

7 Mr. Huber, tell me something that I haven't heard.

8 **MR. HUBER:** The only thing I would add, Your Honor,
9 is that plaintiff failed to even file one grievance, and,
10 therefore, he can't claim that the grievance process at
11 St. Clair County was defective or didn't work because he
12 never even tried to avail himself of it. By failing to file
13 any grievance whatsoever he can't say it didn't work or it
14 wasn't right because he didn't even try.

15 The only grievances we have are from January 25th
16 and 26th, which is just days before he left. So right
17 before he leaves St. Clair County he decides to file a
18 couple captain's requests. There's nothing before that and
19 there's no reason to believe that these grievances --
20 there's nothing on there to show that they were seen by
21 anyone or even submitted.

22 **THE COURT:** Okay. All right. And, Mr. McIntosh,
23 you get the last word.

24 **MR. MCINTOSH:** Okay. Your Honor, I just wanted to
25 point out -- first of all, I just want to say I really don't

1 know what I'm doing because this hearing is kind of taking a
2 turn where I almost don't even know what we're talking about
3 any more.

4 **THE COURT:** Let me tell you. Let me be perfectly
5 clear, okay? We are talking about: Did you try to file a
6 grievance at St. Clair County? Not whether you had pills,
7 not whether they were investigating you, not whether any of
8 those things, okay? Not whether the investigation took 14
9 months. Did you try to exhaust -- did you try to file a
10 grievance at the St. Clair County jail? That's all we're
11 talking about, okay?

12 **MR. McINTOSH:** Yes, sir, I did. And you will
13 notice that these grievance exhibits, the first one contains
14 an actual printed captain's request form. They've never
15 explained how I got these. They're citing that these
16 grievances are inconsistent with the others because the
17 others had responses on them. The problem is that the
18 grievance procedure at the --

19 **THE COURT:** Slow down, slow down, slow down. I got
20 a court reporter. Slow down.

21 **MR. McINTOSH:** The problem is that the grievance
22 system at the St. Clair County jail was designed to not
23 allow me to produce copies with signatures on them. They
24 would not make copies of them after -- they would not
25 provide you with a copy of them. I happened to get these

1 from Strubberg because he handed them back to me; thus,
2 they're faulting me for a system that was designed to
3 produce no paper trail.

4 **THE COURT:** I understand.

5 **MR. McINTOSH:** I would like --

6 **THE COURT:** I understand. Wait a minute. If you
7 were listening, you heard me question the lawyer about the
8 process at the very beginning. I understand your argument
9 that the process is faulty. I got that.

10 **MR. McINTOSH:** And the thing is, I've made specific
11 allegations. I've given you dates, I've given you times,
12 I've given you conversations, I've given you quotations
13 because these things are true. I don't know how to defeat
14 just a general denial coupled with some "I don't recalls."
15 I mean there's really no way around that.

16 **THE COURT:** Well, you got to understand --

17 **MR. McINTOSH:** -- except he has a bad memory.

18 **THE COURT:** All right. Listen. Listen. Listen to
19 me, okay? This is a motion for summary judgment, and I
20 recognize -- listen, I want to clear up some other business
21 before I tell you this. And I think I did this last time
22 but I'm not sure if it's still showing up in the docket,
23 your request for an attorney, and I denied that. And if I
24 haven't denied it before, I'm denying it today.

25 Understand that if we get deeper into the process

1 you can always ask again, all right? This is a motion for
2 summary judgment. The standard is the facts are construed
3 in the light most favorable to the plaintiff. That's you,
4 okay?

5 **MR. McINTOSH:** Yes, sir.

6 **THE COURT:** So, understand we're not talking about
7 the merits of your case; we're only talking about, is there
8 enough before the Court to defeat a motion for summary
9 judgment?

10 All right. Thank you very much. I hope I
11 wasn't -- it's late in the day and, you know, after 3:00 my
12 blood sugar fluctuates, so if I was -- yes, sir?

13 **MR. McINTOSH:** I just wanted to say one final
14 thing, Your Honor, that the only reason I asked about the
15 thing about the legal representative is because if they were
16 called to testify they would tell you that he and Trice did
17 try to pump -- to get her to solicit information from me.

18 See, you know, I kind of agree with the defendants
19 one thing, that it does turn on his credibility, and the
20 problem is that he's really testifying to absolutely
21 nothing, coupled with some "I don't recalls." And the only
22 way for me to be able to bring the issue of credibility
23 before the Court so that you can determine who's telling the
24 truth and who's not is to impeach some of these things that
25 he's saying that I know that I can't impeach, and at this

1 hearing I'm just not able to do that in a way in which I
2 would like, Your Honor, and that was the only reason I
3 brought those issues up.

4 And I'd like to point out one last thing,
5 Your Honor. You know, they've constantly said that had he
6 seen those grievances he would have known it was a nurse and
7 that the investigation would have been over. I just wanted
8 to direct your attention that this report, the nurse said --
9 she advised that several of these medications -- I quote
10 this: Nurse Rodriguez, who was one of the defendants, "also
11 advised that several of these medications are not used by
12 the jail and are not in the formulary."

13 It goes on to say that only one person in the
14 Infirmary 2 was prescribed Naproxen, and he had been on it
15 for two days. Okay. If she's saying that several of the
16 medications are not provided by the jail, she's also
17 admitting that several were provided by the jail. He's
18 testified that he saw this report before he interviewed me;
19 therefore, he knew very well that the source of it had been
20 a nurse because how else would I have gotten into the
21 formulary?

22 **THE COURT:** I got you. Okay. All right. Very
23 good. Thank you. We'll get an order out as quickly as we
24 can. Court's in recess.

25 ***(Proceedings adjourned at 4:54 p.m.)***

REPORTER'S CERTIFICATE

I, Laura A. Esposito, RPR, CRR, CRC, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported in shorthand the proceedings contained in the foregoing 37 pages, and that the same is a full, true, correct, and complete transcript from the record of proceedings in the above-entitled matter.

Dated this 25th day of October, 2018.

 Digitally signed by Laura Esposito
Date: 2018.10.25 15:31:31 -05'00'

LAURA A. ESPOSITO, RPR, CRR, CRC